

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000008-001 DT

01/31/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
T. Melius
Deputy

SCOTTSDALE AREA CHAMBER OF
COMMERCE

PAUL F ECKSTEIN

v.

CITY OF SCOTTSDALE (001)
CAROLYN JAGGAR (001)
BRUCE WASHBURN (001)

ROBERT BRUCE WASHBURN

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Plaintiff asks this Court to review the Orders and Decisions issued below. For the following reasons, this Court reverses and vacates the Orders and Decisions issued below. This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

I. FACTUAL BACKGROUND.

On September 3, 2009, the City Clerk for the City of Scottsdale (Scottsdale) sent notice to the Scottsdale Area Chamber of Commerce (the Chamber) that the Chamber had acted as a political committee for certain advertisements and was therefore required to file campaign finance reports listing its contributions and expenditures. The same day, the Scottsdale City Attorney sent to the Chamber an Order of Compliance and Order Assessing Civil Penalty (First Order) in which it concluded the Chamber had engaged in express advocacy and was therefore required (1) to register as a political committee, (2) to include a "paid for by" disclaimer on its advertisements, (3) to include its three largest political committee contributors in that disclaimer, and (4) to pay a civil penalty of two times the cost of producing and distributing the advertisements. On September 22, 2009, the Chamber requested a hearing pursuant to A.R.S. § 16-924.

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On October 2, 2009, the Scottsdale City Attorney sent to the Chamber another Order Assessing Civil Penalty (Second Order) again concluding the Chamber was a political committee and that it was required to file campaign finance reports listing its contributions and expenditures. The Second Order assessed a penalty pursuant to A.R.S. § 16-918 and a daily penalty until such time as the Chamber filed the finance reports Scottsdale deemed necessary.

On October 9, 2009, Scottsdale set a hearing for November 19, 2009, for the Chamber's appeal of the First Order. The parties submitted a stipulated statement of facts and the Chamber submitted a separate statement of facts. After briefs and arguments, the administrative law judge (ALJ) concluded the advertisements constituted express advocacy and further concluded the advertisements did not meet the safe harbor provision of A.R.S. § 16-901.01(B). Because the ALJ concluded the Chamber had engaged in express advocacy, the ALJ further concluded the Chamber was a political committee and should have submitted a statement of organization before it made its expenditures. The ALJ ordered the Chamber to submit evidence to Scottsdale within 20 days showing the cost of producing and distributing the advertisements and to pay a civil penalty of two times the cost of producing and distributing both communications. On January 6, 2010, the Office of Administrative hearings certified the Decision of the ALJ as the final administrative decision. The Chamber timely appealed the ALJ Decision on the First Order.

For the Second Order, the parties submitted a second stipulated statement of facts, and agreed that they would rely on the briefing and arguments in the First Order. On February 22, 2010, the ALJ issued his Decision of the Second Order and concluded the advertisements were express advocacy and did not meet the requirements for the safe harbor provision of A.R.S. § 16-901.01(B). The ALJ again concluded the Chamber was required to register as a political committee and file campaign finance reports, and ordered the Chamber to pay a civil penalty and a daily penalty until such time as the Chamber filed the finance reports. The Chamber timely appealed the ALJ Decision on the Second Order, and this Court consolidated the two cases.

II. GENERAL STANDARDS FOR REVIEW:

The Arizona statutory authority and case law define the scope of administrative review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

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Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dental Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a “super agency” and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm’n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984). The reviewing court must view the evidence in a light most favorable to upholding the agency’s decision and affirm that decision if it is supported by any reasonable interpretation of the record. *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998). While the reviewing court is not bound by the agency’s conclusions of law or statutory interpretations, an agency’s interpretation of statutes or regulations that it implements is entitled to great weight. *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991); *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998).

However, the agency’s interpretation is not infallible, and courts must remain final authority on critical questions of statutory construction.

U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989).

III. ISSUES.

A. Did the advertisements constitute express advocacy or issue advocacy.

Plaintiff contends the advertisements in question constitute issue advocacy rather than express advocacy. Based upon the authorities cited and the arguments made by the Chamber, this Court concludes the advertisements in question constitute issue advocacy.

B. Do the advertisements fall within the safe harbor provision.

Plaintiff contends that, even if the advertisements in question were considered to be express advocacy, they would fall under the safe harbor provision of A.R.S. § 16–901.01(B). Based upon the authorities cited and the arguments made by the Chamber, this Court concludes the advertisements in question would fall under the safe harbor provision of A.R.S. § 16–901.01(B) and therefore would not be considered express advocacy. Moreover, this Court is concerned that, if the advertisements did not fall within the safe harbor provisions, the terms and the definitions of express advocacy in A.R.S. § 16–901.01(A) would be unconstitutionally vague and over broad.

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C. Were the penalties imposed appropriate.

Plaintiff contends there was no legal or factual basis for the imposition of the monetary penalties imposed, and even if there were a legal and factual basis for the imposition of those penalties, the penalties would constitute excessive fines. Based upon the authorities cited and the arguments made by the Chamber, this Court concludes there is no legal or factual basis for the imposition of the monetary penalties imposed. This Court further concludes that, even if there was a legal and factual basis for the imposition of those penalties, the penalties would constitute excessive fines.

D. Did the orders for disclosure violate the Chamber's freedom of speech.

Plaintiff contends the orders that the Chamber disclose its contributions and expenditures violate the Chamber's First Amendment right to freedom of speech. Based upon the authorities cited and the arguments made by the Chamber, this Court concludes the orders that the Chamber disclose its contributions and expenditures violates the Chamber's First Amendment right to freedom of speech.

IV. CONCLUSION.

Based on the foregoing, this Court concludes the advertisements were not express advocacy and the Chamber therefore was not required to register as a political committee and make a disclaimer or file finance reports. This Court further concludes that, even if the advertisements were considered express advocacy, they would fall within the safe harbor provision of A.R.S. § 16-901.01(B). This Court also concludes there was no legal or factual basis for the penalties imposed, and even if there was a legal or factual basis for those penalties, the penalties amounted to excessive fines. Finally, This Court concludes the imposition of orders and sanctions violates the Chamber's right to freedom of speech. Additionally, this Court concludes the Chamber is entitled to its reasonable attorneys' fees and costs.

IT IS THEREFORE ORDERED reversing and vacating the Orders and Decisions issued below.

IT IS FURTHER ORDERED that, by **February 22, 2011**, Paul Eckstein, as attorney for the Chamber, shall lodge with this Court a proposed order for this Court's signature that incorporates the rulings of this Court, and a statement of attorneys' fees and costs.

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